INDIAN OIL CORP. LTD.

v.

AMRITSAR GAS SERVICE & ORS.

SUPREME COURT INDIA
S RANGANATHAN J
JS VERMA J
M FATHIMA BEEVI J
[CIVIL APPEAL NO. 5701 OF 1985 FROM THE JUDGMENT AND ORDER DATED 5 NOVEMBER 1984 OF THE PUNJAB AND HARYANA HIGH COURT IN C.R. NO. 2340 OF 1984 WITH CIVIL MISCELLANEOUS PETITION NO. 3053 OF 1987]
19 NOVEMBER 1990

ARBITRATION : *Section 15 Arbitration Act 1940 - Modification of award - Relief - Distributorship agreement for sale of LPG revoked by Indian Oil Corporation under clause 27 of the agreement - Clause 27 providing for termination of the agreement by the corporation forthwith on happening of any of the specified events and clause 28 permitting either party 'without prejudice to the foregoing provision or anything to the contrary' contained in the agreement to terminate the agreement by 30 days' notice to the other party without assigning any reason - Arbitrator taking the view on facts that clause 27 was not available to the corporation and that the distributor was entitled to compensation flowing from breach of contract till the breach was remedied by restoration of distributorship.*

ARBITRATION: *Sections 30 and 33 Arbitration Act 1940 - Error apparent on the face of the award - Distributorship agreement with Indian Oil Corporation for sale of LPG being one for rendering personal service - Arbitrator recognising that distributorship was revokable in terms of the agreement - The contract being determinable s. 14(1)(c) of Specific Relief Act attracted - Award granting relief of restoration of the distributorship even on the basis of finding that breach of agreement was committed by the corporation, was therefore in contravention of s. 14(1)(c).*

ARBITRATION: *Sections 30 and 34 Arbitrarion Act 1940 - Error of law apparent on the face of the award - Reference to arbitration made by Supreme Court in appeal arising out of refusal to stay suit under s. 34 - Reference covering all disputes between the parties in the suit - Counter claim made by a party (appellant) in the written statement subsequently - Arbitrator declining to consider the counter claim on the ground that only the dispute under reference required to be determined.*

CONSTITUTIONAL LAW: *Articles 14 and 298 - Instrumentality of state viz. Indian Oil Corporation entering into distributorship contract with private party - Breach of contract alleged and remedies flowing therefrom sought by the distributor - Award rendered by arbitrator on that basis alone - In the circumstances held, questions of public law based on Article 14 do not arise for decision - Matter must be decided strictly in the realm of private law rights governed by the general law relating to contracts with reference to the provisions of the Specific Relief Act providing for non-enforceability of certain types of contracts.*

[**Editor's Note :** This case was reported in the Supreme Court Cases [1991] 1 SCC 533 and is reproduced with the kind permission of the publishers.]

Cases referred to:
Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay [1989] 3 SCC 293 ***(cit)***
Mahabir Auto Stores v. Indian Oil Corporation [1990] 3 SCC 752; JT [1990] 1 SC 363 ***(cit)***
Shrilekha Vidyarthi v. State of U.P. [1991] 1 SC 212; JT [1990] 4 SC 211 ***(cit)***

Legislation referred to:
Arbitration Act 1940, ss. 15, 30, 33, 34
Constitution of India [Ind], arts. 14, 298

For the appellant - Harish N. Salve, (R. Shakdhar, S. Singhi, P. Shroff, S.S. Shroff, R. Sasiprabhu & Suruchi Aggarwal with him), Advocates
For the respondents - D.V. Sehgal, Senior Advocate (N.K. Agarwal, Advocate, with him)

JUDGMENT

JS Verma J:

This appeal by special leave is by the Indian Oil Corporation Ltd. against the judgment of the Punjab and Haryana High Court in Civil Revision No. 2340 of 1984, decided on 5 November 1984, dismissing the revision against the order dated 28 July 1984, passed by the Additional District Judge, Amritsar, in CMA No. 22 of 1983, affirming the order dated 19 October 1983 of the Sub-Judge, 1st Class, Amritsar, in Suit No. 376 of 1983 by which the appellant's application made under s. 34 of the Arbitration Act for stay of the suit was dismissed. The brief facts giving rise to this appeal and indicating the points for decision herein are now stated.

A distributorship agreement dated 1 April 1976 was made between the Indian Oil Corporation Ltd. (hereinafter called as 'the corporation') and the Amritsar Gas Service, respondent 1, as distributor of the corporation for sale of the corporation's Liquefied Petroleum Gas (LPG) known as 'Indane' in cylinders only for household consumers and commercial consumers in the area at Amritsar, specified in the agreement. The terms and conditions of distributorship were specified in the agreement. Clause 27 of the agreement provided for termination of the agreement by the corporation forthwith on the happening of any of certain specified events. Clause 28 permitted either party 'without prejudice to the foregoing provision or anything to the contrary' contained in the agreement to terminate the agreement by 30 days' notice to the other party 'without assigning any reason for such termination'. Clause 37 provided for adjudication of any dispute or difference of any nature by arbitration.

It appears that the appellant-corporation received certain complaints about the working of the distributorship alleging unauthorised connections being given and tampering of the waiting list of customers by the distributor which were acts prejudicial to the interest, reputation and products of the appellant-corporation. Accordingly, the appellant-corporation invoked clause 27 of the Distributorship Agreement and by its letter No. LPG/00l dated 11 March 1983, it terminated forthwith the distributorship. The said notice reads as under:

> M/s. Amritsar Gas Service
> Madan Mohan Malviya Road,
> Amritsar City.
>
> Dear Sirs,
>
> Re: Indane Distributorship at Amritsar
>
> Please refer to the LPG Distributorship Agreement dated 1 April 1967 executed between you and the Indian Oil Corporation. Clause 27 of the Distributorship Agreement reads as under:

27. Notwithstanding anything to the contrary herein contained the corporation shall also be at liberty at its entire discretion to terminate this agreement forthwith upon or at any time after the happening of any of the following events, namely:

(h) If the distributor does not adhere to the instructions issued from time to time by the corporation in connection with safe practices to be followed by him in the supply and storage of the corporation's products or otherwise;

(i) If the distributor shall give out unauthorised connections to any person without the corporation receipt/subscription voucher or otherwise howsoever;

(n) If the distributor shall either by himself or by his servants or agents commit or suffer to be committed any act which, in the opinion of the regional manager of the corporation for the time being at New Delhi, whose decision in that behalf shall be final, is prejudicial to the interest or good name of the corporation or its products;

the regional manager shall not be bound to give reasons for such decision.

It has come to our knowledge that either you or your servants or agents have committed the following:

1. That you have released unauthorised connections by tampering with the waiting list registration record.
2. That you have issued connections to those people who had not booked themselves for gas connections.
3. That you have sold refill to unauthorised customers.
4. That you have issued duplicate issue slips.

The above acts jointly and severely (*sic*) in my opinion are acts which are prejudicial to the interest or good name of the corporation or its products and accordingly in exercising my right under the above noted clause, I hereby order that the LPG Distributorship Agreement stands forthwith terminated and cancelled and you shall cease to be our LPG distributor at Amristar with immediate effect.

You are hereby called upon to settle all your accounts with the corporation and immediately hand over, return and re-deliver the entire stock of LPG filled, empty cylinders, equipments lying with you. You are hereby also advised to hand over all the documents, stationery and other relevant papers of the said distributorship to the authorised representative of the corporation who would be calling on you shortly.

Yours faithfully
for and on behalf of
Indian Oil Corporation Ltd.
Sd/-
(S.K. Bakshi)
General Manager

Aggrieved by termination of the distributorship in this manner, respondent 1 filed a suit in the Court of Sub-Judge, 1st Class, Amritsar, on 23 September 1983, impleading as defendants the appellant-corporation, some of its officers and some other persons to whom the distributorship for that area was to be given. The relief claimed in the suit in substance was for a declaration that termination of the distributorship of the plaintiff-respondent 1 was illegal and void; that the distributorship continued notwithstanding the said termination; and some other consequential reliefs. It may be mentioned that the suit was based entirely on the terms and conditions of the distributorship agreement and inapplicability to the facts of clause 27 permitting forthwith termination without any notice or opportunity to show cause being given to the distributor. The appellant-corporation filed an application under s. 34 of the Arbitration

Act for staying the suit which was rejected by the trial Court. The appeal against that order and thereafter a revision to the High Court were also dismissed giving rise to the present appeal by special leave.

This Court, by its order dated 16 December 1985, while granting special leave to appeal, passed the following order:

> Special leave granted.
>
> We have heard learned Counsel for the parties and we are of opinion that the disputes between the parties can more appropriately be disposed of by arbitration. Subject to his consent in that behalf, we appoint Shri A.D. Koshal, a retired Judge of this Court, as arbitrator for the purpose of deciding the disputes between the parties, the disputes being those mentioned in Suit No. 376 of 1983 pending before the Court of the learned Senior Subordinate Judge, Amritsar. Learned Counsel for the parties are agreed to the appointment of Shri A.D. Koshal as arbitrator, and are further agreed that they will be bound by any award made by him and will not question that award in any proceeding hereafter.
>
> The appeal is disposed of accordingly.

It appears that Shri A.D. Koshal was unable to function as the arbitrator and, therefore, a modification was made by this Court's order dated 9 April 1986, as under:

> By consent of parties we appoint Mr. B.R. Tuli, a retired Judge of the High Court of Punjab and Haryana as arbitrator to arbitrate on the dispute between the parties raised in this appeal and the dispute in Suit No. 376 of 1983 pending before the Court of learned Senior Subordinate Judge, Amritsar. The award will be subject to the provisions of the Arbitration Act, including the remedies available under the Act.

It is pursuant to the order of reference dated 16 December 1985, modified as above by the order dated 9 April 1986 by this Court, that Shri B.R. Tuli, a retired Judge of the Punjab and Haryana High Court has made the award dated 15 November 1986. On the pleadings of the parties, the arbitrator framed the issues as under:

(1) Whether the termination of plaintiff's distributorship was validly effected by the defendant corporation? ORD.

(2) If Issue No. 1 is decided against the defendant corporation, to what relief is the plaintiff entitled? OPP.

(3) Is the defendant entitled to make the counter-claim as stated in the written statement? If so, to what amount is the defendant entitled? ORD.

The arbitrator then recorded his decision on the issues framed and granted the reliefs as under:

> I have very carefully considered the evidence, both oral and documentary, led in the case and the arguments addressed by the learned Counsel for the parties. *In this light of the facts and circumstances of the case and the law governing such cases, I record my decision* on various issues framed in the case as under:
>
> *Issue No. 1.* I hold that the termination of the plaintiff's distributorship was not validly effected by the defendant corporation and thus decided this issue in favour of the plaintiff.
>
> *Issue No. 2.* As a consequence of my decision on Issue No. 1, the plaintiff is granted a declaration that the termination of its distributorship by the defendant corporation by letter dated 11 March 1983, was wrongful, invalid and not binding on the plaintiff. The plaintiff is held entitled to due compensation flowing from the breach of the contract by the defendant corporation till the breach of the contract is remedied by the restoration of the distributorship. The quantum of compensation will be the commission that the plaintiff would have earned on the supply of L.P. Gas cylinders to its customers if the distributorship had not been

terminated, as per the statement made by the learned Counsel for the defendant corporation before the learned Subordinate Judge, 1st Class, Amritsar, on 15 October 1983 and the order of the learned Court dated 19 October 1983, based on that statement. The defendant corporation shall render account of such commission which would have been earned by the plaintiff firm from the date of the wrongful termination of the plaintiff's distributorship, that is, 14 March 1983, to the date on which the distributorship is restored to the plaintiff firm. The learned Court, before whom the application is made for making the award the rule of the Court, shall pass an appropriate decree in this behalf in case the award is upheld. The plaintiff is also held entitled to the price of 224 cylinders, which, I hold, were filled ones and to the return of 384 regulators and all other articles, registers and cards etc., taken into possession by the defendant corporation from the office premises and godowns of the plaintiff firm on 14 March 1983. In short, the position will be restored as it was before cancellation.

The defendant corporation shall also return the amounts of two drafts of Rs15,580.83 each dated 8 March 1983 and 11 March 1983 sent to its Jalandhar Depot by the plaintiff firm against which no supplies were made to it.

Since the defendant corporation has committed the breach of the contract of distributorship of the plaintiff firm, I hold it liable to remedy the breach by **restoration of the distributorship in the peculiar facts of this case, I consider it to be an exceptional case for the following reasons:**

(i) The damages cannot be determined as the number of years for which the damages should be awarded cannot be fixed nor will damages afford an adequate relief to the plaintiff firm.

(ii) The distributorship of L.P. Gas is not easily available as it is not a commodity which is sold and bought in the market.

(iii) The partners of the plaintiff firm are engineering graduates and were granted this distributorship in the category of unemployed engineering graduates to provide them with the means of livelihood as per the policy of the government. They were appointed by letter dated 1 December 1971, in pursuance of which they made all arrangements by hiring office premises and godowns and fitting and furnishing them properly by investing a good deal of money to make this business the source of their livelihood. They had held this distributorship for 11 years before it was terminated. Those were the years which were vital for them to establish themselves in service or business and make a career thereof for earning livelihood during the rest of their lives. Those precious years have gone never to return.

(iv) The distributorship agreement was for an indefinite period, that is, till the time it was terminated in accordance with the terms contained therein. Since it has not been terminated in accordance with clause 27 thereof, under which the termination was made, the plaintiff firm is entitled to the continuance of the distributorship in the special circumstances of this case.

This award will, however, not fetter the right of the defendant corporation to terminate the distributorship of the plaintiff in accordance with the terms of the agreement dated 1 April 1976, if and when an occasion arises.

Issue No. 3. I hold that the counter-claim made by the defendant corporation in its written statement cannot be determined by me in these arbitration proceedings for the reason that only the dispute between the parties raised in Civil Appeal No. 5701 of 1985 in the Supreme Court and the dispute in Suit No. 376 of 1983, pending in the Court of the learned Senior Subordinate Judge, Amritsar, have been referred to me for decision. The counter-claim made by the defendant corporation in its written statement was not there on 9 April 1986, the date of the order of the Hon'ble Supreme Court making reference to me. This counter-claim is, therefore, left undecided.

Reliefs: The plaintiff is granted the following reliefs:

(1) A declaration that the termination of its distributorship of L.P. Gas by the defendant corporation by letter dated 11 March 1983, was wrongful and invalid and not binding on the plaintiff.

(2) The defendant corporation is directed by mandatory injunction to remedy the breach of the contract by restoring the distributorship to the plaintiff as it existed on 14 March 1983, before its termination and to return all articles, goods and records taken into possession by the defendant corporation from the office premises, showrooms and godowns of the plaintiff and to pay to the plaintiff firm the amounts of two demand drafts for Rs 15,580.83 each dated 8 March 1983 and 11 March 1983 sent to Jalandhar Depot of the defendant corporation for supply or refills and against which no supplies were made.

(3) The defendant corporation shall render account of the commission which the plaintiff firm would have earned if the distributorship had not been terminated from 14 March 1983, to the date of the restoration of the distributorship and to pay the same to the plaintiff firm.

(4) The defendant corporation shall pay the costs of the suit as may be determined by the learned Court. The defendant corporation shall also pay to the plaintiff the costs of these arbitration proceedings amounting to Rs 6750, the amount of fees paid by it to me. (Emphasis supplied)

In short, the arbitrator in his award has held that the appellant-corporation committed breach of contract and on that basis, it has been held liable to remedy the breach by restoration of the distributorship and pay compensation for the reasons given in the award. The counter-claim made by the appellant-corporation in the written statement was not decided by the arbitrator on the ground that it did not come within the scope of the reference. Respondent 1 has filed an application (CMP No. 3053 of 1987) to direct the arbitrator to file the award and then to make the award a rule of the Court and to pass a decree in terms thereof. The appellant-corporation has, however, filed objections dated 31 August 1987 under s. 30 of the Arbitration Act. It is this CMP and the objections therein which are to be decided by us.

The arguments advanced by Shri Harish Salve on behalf of the appellant-corporation to the validity of the award are these. The first contention is that the validity of the award has to be tested on the principles of private law and the law of contracts and not on the touchstone of constitutional limitations to which the Indian Oil Corporation Ltd., as an instrumentality of the state may be subject since the suit was based on breach of contract alone and the arbitrator also proceeded only on that basis to grant the reliefs. It is urged that for this reason the further questions of public law do not arise on the facts of the present case. The next contention is that the relief of restoration of the contract granted by the arbitrator is contrary to law being against the express prohibition in ss. 14 and 16 of the Specific Relief Act. It is urged that the contract being admittedly revocable at the instance of either party in accordance with clause 28 of the agreement, the only relief which can be granted on the finding of breach of contract by the appellant-corporation is damages for the notice period of 30 days and no more. It was then urged that the reasons given in the award for granting the relief of restoration of the distributorship are untenable, being contrary to law. Shri Salve contended that the propositions of law indicated in the award and applied for granting the reliefs disclose an error of law apparent on the face of the award. It was also urged that the onus of proving valid termination of the contract was wrongly placed by the arbitrator on the appellant-corporation instead of requiring the plaintiff-respondent 1 to prove that the termination was invalid. It was also contended that the failure of the arbitrator to consider and decide the appellant-corporation's counter-claim when the whole suit was referred for decision constitute legal misconduct.

In reply, Shri Sehgal on behalf of respondent 1 contended that there is a presumption of validity of award and the objections not taken specifically must be ignored. This argument of Shri Sehgal relates to the grievance of the appellant relating to placing the onus on the appellant-corporation of proving validity of the termination. This contention of Shri Sehgal must be upheld since no such specific ground is taken in the objections of the appellant. Moreover, there being a clear finding by the arbitrator of breach of contract by invalid termination, the question of onus is really of no significance. The other arguments of Shri Sehgal are that the termination of distributorship casts stigma on the partners of the firm; counter-claim of the appellant-corporation was rightly not considered since it was not made before the order of the reference; the reference made being of all disputes in the suit, the nature of relief to be granted was also within the arbitrator's jurisdiction; and interest also must be awarded to the respondent.

We may at the outset mention that it is not necessary in the present case to go into the constitutional limitations of Article 14 of the Constitution to which the appellant-corporation as an instrumentality of the state would be subject particularly in view of the recent decisions of this Court in *Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay* [1989] 3 SCC 293, *Mahabir Auto Stores v. Indian Oil Corporations* [1990] 3 SCC 752:JT [1990] 1 SC 363 and *Shrilekha Vidyarthi v. State of U.P.* [1991] 1 SCC 212: JT [1990] 4 SC 211. This is on account of the fact that the suit was based only on breach of contract and remedies flowing therefrom and it is on this basis alone that the arbitrator has given his award. Shri Salve is, therefore, right in contending that the further questions of public law based on Article 14 of the Constitution do not arise for decision in the present case and the matter must be decided strictly in the realm of private law rights governed by the general law relating to contracts with reference to the provisions of the Specific Relief Act providing for non-enforceability of certain types of contracts. It is, therefore, in this background that we proceed to consider and decide the contentions raised before us.

The arbitrator recorded finding on Issue No. 1 that termination of distributorship by the appellant-corporation was not validly made under clause 27. Thereafter, he proceeded to record the finding on Issue No. 2 relating to grant of relief and held that the plaintiff-respondent 1, was entitled to compensation flowing from the breach of contract till the breach was remedied by restoration of distributorship. Restoration of distributorship was granted in view of the peculiar facts of the case on the basis of which it was treated to be an exceptional case for the reasons given. The reasons given state that the distributorship agreement was for an indefinite period till terminated in accordance with the terms of the agreement and, therefore, the plaintiff-respondent 1 was entitled to continuance of the distributorship till it was terminated in accordance with the agreed terms. The award further says as under:

> This award will, however, not fetter the right of the defendant corporation to terminate the distributorship of the plaintiff in accordance with the terms of the agreement dated 1 April 1976, if and when an occasion arises.

This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the agreement dated 1 April 1976, which contains the aforesaid cls. 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revocable in accordance with cls. 27 and 28 of the agreement. It is in this sense that the award describes the distributorship agreement as one for an indefinite period, that is, till terminated in accordance with Clauses. 27 and 28. The finding in the award being that the distributorship agreement was revocable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Subs (1) of s. 14 of the Specific Relief Act

specifies the contracts which cannot be specifically enforced, one of which is 'a contract which is in its nature determinable'. In the present case, it is not necessary to refer to the other clauses of subsection (1) of s. 14, which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-corporation is contrary to the mandate in s. 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to 'the law governing such cases'. The grant of this relief in the award cannot, therefore, be sustained.

Another relief granted in the award is the price of 224 cylinders and 384 regulators taken away by the appellant-corporation from the plaintiff-respondent 1. These articles did not belong to the plaintiff-respondent 1 and were the property of the appellant-corporation and, therefore, the direction to pay its price to the plaintiff-respondent 1 also discloses an error of law apparent on the face of the award. The appellant-corporation has also been directed in the award to return the amounts of two bank drafts of Rs 15,580.83 each dated 8 March 1983 and 11 March 1983 on the ground that no supplies were made to the plaintiff-respondent 1 against these amounts. This direction is based on a finding of fact which cannot be gone into and, therefore, the same cannot be interfered with.

The question now is of the relief which could be granted by the arbitrator on its finding that termination of the distributorship was not validly made under clause 27 of the agreement. No doubt, the notice of termination of distributorship dated 11 March 1983 specified the several acts of the distributor on which the termination was based and there were complaints to that effect made against the distributor which had the effect of prejudicing the reputation of the appellant-corporation; and such acts would permit exercise of the right of termination of distributorship under clause 27. However, the arbitrator having held that clause 27 was not available to the appellant-corporation, the question of grant of relief on that finding has to proceed on that basis. In such a situation, the agreement being revocable by either party in accordance with clause 28 by giving 30 days' notice, the only relief which could be granted was the award of compensation for the period of notice, that is, 30 days. The plaintiff-respondent 1 is, therefore, entitled to compensation being the loss of earnings for the notice period of 30 days instead of restoration of the distributorship. The award has, therefore, to be modified accordingly. The compensation for 30 days notice period from 11 March 1983 is to be calculated on the basis of earnings during that period disclosed from the records of the Indian Oil Corporation Ltd.

The appellant's grievance regarding non-consideration of its counter-claim for the reason given in the award does appear to have some merit. In view of the fact that reference to arbitrator was made by this Court in an appeal arising out of refusal to stay the suit under s. 34 of the Arbitration Act and the reference was made of all disputes between the parties in the suit, the occasion to make a counter-claim in the written statement could arise only after the order of reference. The pleadings of the parties were filed before the arbitrator, and the reference covered all disputes between the parties in the suit. Accordingly, the counter-claim for the only reason given in the award does, therefore, disclose an error of law apparent on the face of the award. However, in the present case, the counter-claim not being pressed at this stage by learned Counsel for the appellant, it is unnecessary to examine this matter any further.

As a result of the above discussion, the award is modified to the extent indicated inasmuch as plaintiff-respondent 1 is entitled to compensation amounting to loss of earnings for the notice period of 30 days from the date of notice dated 11 March 1983 calculated as indicated above, but not to restoration of the distributorship; and refund of amounts of two demand drafts for Rs 15,580.83 each dated 8 March 1983 and 11 March 1983 given by respondent 1 to the appellant-corporation. A decree in terms of such a modified award be drawn. Costs of arbitration are to be paid by the appellant corporation. Costs of this appeal shall also be borne by the appellant.

Also found at [1991] 3 CLJ 1685